

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Charter Communications	)	CSR 7075-E
	)	
Petition for Determination of Effective	)	
Competition in Fergus Falls, MN (CUID MN017)	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 21, 2011****Released: February 7, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Charter Communications (“Petitioner”) has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(4) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in the community listed on Attachment A (the “Community”). Petitioner alleges that its cable system serving the Community is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in the Community because of the competing service provided by two direct broadcast satellite (“DBS”) providers and an affiliate of a local exchange carrier (“LEC”). The City of Fergus Falls, Minnesota (the “City”), filed an untimely opposition.<sup>3</sup> Petitioner filed a reply to the City’s opposition.<sup>4</sup>

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>5</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>6</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>7</sup> For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Community.

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<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> Opposition to Petition for Determination of Effective Competition (“Opposition”). The Opposition was filed twelve days late (47 C.F.R. § 76.7(b)(1)) and was not accompanied by a motion showing good cause for the lateness. We strike it as an unauthorized pleading but will consider the points it makes as informal comments.

<sup>4</sup> Reply to Opposition (“Reply”).

<sup>5</sup> 47 C.F.R. § 76.906.

<sup>6</sup> See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

<sup>7</sup> See 47 C.F.R. §§ 76.906 & 907.

## II. DISCUSSION

### A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>8</sup> This test is referred to as the “competing provider” test.

#### 1. The First Part

4. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>9</sup> Turning to the first part of this test, it is undisputed that the Community is “served by” both DBS providers, DirecTV, Inc. (“DirecTV”), and Dish Network (“Dish”), and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.<sup>10</sup> The Commission has held that a party may use evidence of subscription rates in the franchise area (the second part of the competing provider test, discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>11</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in media that serve the Community to support their assertion that potential customers in the Community are reasonably aware that they may purchase the service of these MVPD providers.<sup>12</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>13</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.<sup>14</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Community because of their national satellite footprint.<sup>15</sup> The City does not dispute that Petitioner has satisfied the first part of the competing provider test.<sup>16</sup> Accordingly, we find that the first part of the competing provider test is satisfied.

<sup>8</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>9</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup> *See* Petition at 3.

<sup>11</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>12</sup> 47 C.F.R. § 76.905(e)(2); Petition at Exh. 1.

<sup>13</sup> *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4.

<sup>14</sup> *See* Petition at 5 and Exh. 2.

<sup>15</sup> *See* Petition at 3.

<sup>16</sup> Opposition at 2.

## 2. The Second Part

5. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in the franchise area. This part requires the calculation of a ratio, the numerator of which is the number of subscribers to MVPDs other than the largest one in the Community and the denominator of which is the number of households there. To show competing provider effective competition, the ratio must be over 15 percent. Petitioner asserts, without objection by the City, that it is the largest MVPD in the Community.<sup>17</sup>

6. Concerning the numerator of the ratio, Petitioner sought to determine the number of DBS subscribers in the Community by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers in the five-digit zip code that includes all of the Community and some additional territory outside the Community.<sup>18</sup> To that number (1,369)<sup>19</sup> Petitioner applied an allocation factor (69.4 percent) to estimate the number of DBS subscribers in the Community (950).<sup>20</sup> To the latter number Petitioner added 160, which is the number of subscribers to the MVPD service of an affiliate of the LEC in the Community, Otter Tail Telecom (“Otter Tail”).<sup>21</sup> Petitioner therefore estimates the number of subscribers to MVPDs in the Community other than the largest one, and the numerator of the statutory ratio, to be 1,110.<sup>22</sup> The denominator of the statutory ratio – the number of households in the Community – Petitioner took from the 2000 Census, which states the number of households in the Community to be 5,633.<sup>23</sup> Petitioner’s numbers, if accepted, show subscription to MVPDs other than the largest one in the Community to be 19.7 percent,<sup>24</sup> well in excess of the minimum (15 percent) needed to show competing provider effective competition.

### a. The City’s Objections

7. The City, however, makes several objections to Petitioner’s calculations. It objects, first, that Petitioner may have misinformed SBCA about the boundaries of the Community.<sup>25</sup> This objection is specious because Petitioner gave SBCA no information about the boundaries of the Community. Petitioner gave SBCA the five-digit zip code for the City, and asked SBCA for the number of DBS subscribers in it.

8. Second, the City appears to object to Petitioner’s allocation factor, claiming that “the vast majority of DBS subscribers” live in the part of the zip code that lies outside the Community and asking

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<sup>17</sup> Petition at 6.

<sup>18</sup> *Id.* at 6-7. The City appears to believe that Petitioner estimated the number of DBS subscribers in the Community based on “ZIP+4” or 9-digit zip codes. Opposition at 3. The City is mistaken because the Petition plainly states that Petitioner used a 5-digit zip code and an allocation factor. Petition at 6 & Exh. 4.

<sup>19</sup> Petition at Exh. 4.

<sup>20</sup> *Id.* at Exh. 7.

<sup>21</sup> *Id.* at Exh. 9. Petitioner does not claim that LEC effective competition (47 U.S.C. § 543(1)(1)(D)) exists in the Community. We need not address that possible issue because we find that competing provider effective competition exists there.

<sup>22</sup> Petition at 7.

<sup>23</sup> *Id.* at Exh. 6.

<sup>24</sup> *Id.* at 7-8.

<sup>25</sup> Opposition at 3-4.

for “greater detail” about Petitioner’s allocation.<sup>26</sup> The City offers no substantiation at all for its claim that the vast majority of DBS subscribers reside outside of the franchise area. The City, as the local government in the Community, is in a position to substantiate real doubts about Petitioner’s allocation, if any existed. It has failed to do so.

9. Petitioner’s allocation factor of 69.4 percent is rational. Petitioner developed it by dividing the Census’s number of households in the Community (5,633) by the US Postal Service’s number of residential addresses in the zip code (8,114). We have repeatedly accepted such allocations.<sup>27</sup> Petitioner’s use of such an allocation discharges its burden of proof and requires the City to do more than express general skepticism.<sup>28</sup>

10. Third, the City makes a general objection that it cannot verify Otter Tail’s statement that it has 160 MVPD subscribers in the Community.<sup>29</sup> Otter Tail’s statement, however, is precise and unequivocal, that it serves 160 “households” in “the City of Fergus Falls” based on its “[b]illing system subscriber counts.”<sup>30</sup> The City has given neither evidence nor reasoning to cast doubt the accuracy of Otter Tail’s statement. The Commission has repeatedly allowed cable operators to use third party data, from sources such as SBCA and independent MVPDs, to support effective competition claims.<sup>31</sup> We therefore accept Otter Tail’s statement for purposes of this proceeding.

11. Fourth, the City objects to Petitioner’s use of 2000 Census data to estimate the number of households in the City, claiming that it is stale and should not be used with subscribership data from several years later.<sup>32</sup> The City notes that Fergus Falls has experienced growth since 2000.<sup>33</sup> The City’s objections, again, fail for their vagueness and lack of substantiation. Our decisions have consistently used the most recently completed Census data for purposes of calculating households in a franchise area, even if it is several years old.<sup>34</sup> We will accept more recent household data that is demonstrated to be reliable,<sup>35</sup> but the City has produced no such data here. Its general claim of growth neither undermines

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<sup>26</sup> *Id.* at 4.

<sup>27</sup> See, e.g., *Comcast Cable Commun., LLC*, 25 FCC Rcd 7201, 7203, ¶ 6 n.16 (2010); *Charter Commun.*, 22 FCC Rcd 10107, 10108-10, ¶¶ 5-7 (2007); *Charter Commun. Properties, LLC*, 17 FCC Rcd 4617, 4719, ¶ 6 (2002).

<sup>28</sup> See, e.g., *CoxCom, Inc.*, 22 FCC Rcd 4522, 4526, ¶ 12 (2007); *Comcast Cable Commun., LLC*, 22 FCC Rcd 694, 699, ¶ 14 (2007) (“*Comcast*”):

“By allowing Comcast to use [certain] data, the Commission is not shifting the burden of proof to the City; however, once Comcast has satisfied its burden of proof, the City can no longer simply rely on the presumption of no effective competition. While the Commission understands that filing an opposition can be a time-consuming and costly endeavor, such a requirement does not imply that the petitioner’s filing is viewed with deference.”

<sup>29</sup> Opposition at 4.

<sup>30</sup> Petition at Exh. 9.

<sup>31</sup> See, e.g., *CoxCom, Inc.*, 22 FCC Rcd 4384, 4387, ¶ 10 (2007) (“*Cox*”); *Comcast*, 22 FCC Rcd at 699, ¶ 13; *Adelphia Cable Commun.*, 20 FCC Rcd 20536, 20539, ¶ 9 (2005), *application for review pending*; see also 47 C.F.R. § 76.907(c).

<sup>32</sup> Opposition at 4.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., *Cox*, 22 FCC Rcd at 4386-87, ¶ 9; *CC VIII Operating, LLC*, 19 FCC Rcd 6204, 6205, ¶ 4 (2004); *MediaOne of Georgia, Inc.*, 12 FCC Rcd 19406, 19408, ¶ 4 (1997).

<sup>35</sup> See, e.g., *Comcast Cable Commun., LLC*, 23 FCC Rcd 10939, 10942, ¶ 12 (2008); *Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4462, ¶ 14 (2007); *Bright House Networks, LLC*, 20 FCC Rcd 16823, 16827, ¶ 10 (2005); *MCC Iowa LLC*, 20 FCC Rcd 15267, 15270, ¶ 8 (2005).

the precise Census data used by Petitioner nor gives any helpful basis for improving on it. Finally, we note that Petitioner's numbers show competing provider effective competition substantially above the legal minimum. To defeat Petitioner's evidence, the City needed to produce not only some contrary evidence, but evidence of substantial inaccuracy in Petitioner's case. The City has failed to do so.

**b. Conclusion**

12. Based upon Petitioner's competing MVPD subscription and household numbers, which are shown in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Community. Therefore, the second part of the competing provider test is satisfied for the Community.

13. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Petitioner is subject to effective competition in the Community listed on Attachment A.<sup>36</sup>

**III. ORDERING CLAUSES**

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Charter Communications **IS GRANTED**.

15. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>37</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

<sup>36</sup> Petitioner asks that we "recognize the existence of effective competition at least as early as the date of this Petition." Petition at 2 n.6. The Commission, when it grants a cable operator's petition for a finding of effective competition, recognizes the filing date of the petition as the date on which the cable operator was subject to effective competition. *Comcast Cable of Dallas, L.P.*, 20 FCC Rcd 19282, ¶ 3 (2005); *Mediacom Minnesota, LLC*, Order, 20 FCC Rcd 15687, 15688, ¶ 4 (2005); *Alert Cable T.V. of North Carolina, Inc.*, 19 FCC Rcd 80, 81, ¶ 5 (2004); *Rifkin & Associates, Inc.*, 17 FCC Rcd 14233, 14234, ¶ 5 (2002). We do so here, and find that Petitioner has been subject to effective competition in the Community since the date it filed the Petition herein.

<sup>37</sup> 47 C.F.R. § 0.283.

**ATTACHMENT A****CSR 7075-E****COMMUNITIES SERVED BY CHARTER COMMUNICATIONS**

<b>Communities</b>	<b>CUID</b>	<b>CPR*</b>	<b>2000 Census Households</b>	<b>Estimated Competing Provider Subscribers</b>
Fergus Falls	MN0017	19.70%	5,633	1110

\*CPR = Percent of competitive DBS subscription rate.